United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

75-2136

To be argued by
PHYLIS SKLOOT BAMBERGER

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

SEYMOUR KLONER,

Appellant,

-against-

UNITED STATES OF AMERICA,

Appellee.

Docket No. 75-2136

B
P/S

BRIEF FOR APPELLANT

ON APPEAL FROM AN ORDER
OF THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

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QUESTION PRESENTED

Whether the Judge's failure to review the record of the prior proceedings involving petitioner and to consider on the merits the issues raised in the petitions requires that the order be vacated; whether the judgment must be vacated because the plea was invalid or, alternatively, must the case be remanded.

STATEMENT PURSUANT TO RULE 28(a)(3)

Preliminary Statement

This appeal is from orders of the United States District Court for the Eastern District of New York (The Honorable Leo F. Rayfiel, Senior District Judge) entered on September 22, 1975, denying three consolidated proceedings pursuant 28 U.S.C. §2255 and §2241.

This Court assigned The Legal Aid Society, Federal Defender Services Unit, to represent petitioner Kloner on his appeal, pursuant to the Criminal Justice Act.

Statement of Facts

Appellant Kloner filed three pro se petitions for writs of habeas corpus in the United States District Court for the Eastern District of New York on August 19, 1975. In his petitions appellant claimed that parole was improperly revoked, that he had been advised that there was an agreement between his defense counsel and the Assistant United States Attorney that in exchange for a plea of guilty he would be sentenced to two years on probation, that he was represented at sentencing by an attorney he had never previously seen, that he was never advised of his right to appeal, and that his conditions of confinement were endangering his

health, and preventing him from practicing his religion.

The Judge consolidated the petitions and denied the applications in an opinion annexed hereto as B to appellant's separate appendix. In making his decision, the Judge did not examine the tape of the parole revocation hearing or the minutes of the plea and sentence.*

A. Chronology of prior proceedings

On September 2, 1971, appellant pleaded guilty to violation of 18 U.S.C. §2113(b), bank larceny. The minutes of plea** show that the Judge read Count 2 of the indictment which charged appellant with knowingly and willfully taking with intent to steal $1,974 in the custody of a bank insured by the FDIC.

The Judge advised appellant of his right to a jury, and his right to call witnesses and have them testify on his behalf. The Court said nothing about the right to a unanimous verdict, the Government's burden of proof, or the right to remain silent.

After some confusion, the Judge told appellant he could receive a sentence of up to ten years and a fine of $5,000. The following colloquy took place:

> THE COURT: Has anyone made any promises to you or made any threats or used any duress in inducing you to enter a plea of guilty?
>
> THE DEFENDANT: No, sir.

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* The minutes of plea and sentence were transcribed only after appellate counsel ordered them.

** The minutes are annexed as C to appellant's separate appendix.

THE COURT: Is the plea entirely voluntary on your part?

THE DEFENDANT: Yes.

THE COURT: You keep looking at your lawyer. Do you understand what I've said to you? Is the plea voluntary?

THE DEFENDANT: Yes.

MR. SCHACHTER: The defendant is a very nervous individual.

THE COURT: Would you come up, please? Mr. Kloner, I am prompted to ask you these questions because of the fact on several occasions during the course of my colloquy with you you have turned toward your counsel as if inquiringly. Have you ever undergone psychiatric care?

The Judge accepted the plea. The Assistant United States Attorney then suggested that "it would be beneficial if a factual basis was established for the plea." The Judge, in response to the request, stated that he had read the indictment. Then he asked the appellant if he had committed the act. Appellant responded only that he had made a confession to the FBI. The Court did not request to see that confession.

A sentence of five years' imprisonment was imposed and the provisions of 4208(a) were made applicable.

On September 17, 1973, appellant was released on parole. On January 24, 1975, appellant was arrested for violation of parole. He was charged with failing to report a change of address to his parole officer and leaving the area of parole supervision without permission. At the local parole revocation hearing held at the Federal House of Detention on February 24, 1975, appellant was found to have violated parole by the conduct charged in the warrant. His parole was revoked and he was ordered re-incarcerated pending an institutional review in January 1977. He pursued his administrative appeals.

On March 31, 1975, appellant was released to the custody of New York State officials. He subsequently pleaded guilty to two grand larceny charges and, on November 6 and 7, 1975, was sentenced pursuant to the two convictions. On December 12,

1975, he was returned to federal custody. Appellant is presently in custody at the Metropolitan Correctional Center.

B. The petitions

By a pro se petition dated August 19, 1975, (75 C. 1212 E.D.N.Y.) and another document filed earlier, appellant challenged the validity of the parole revocation proceedings. Appellant asserted that his probation officer was aware that he had temporarily changed his address and that in fact the officer had reached him at the temporary address several times. Appellant was staying with his fiancee who he was caring for, because she had been ordered to complete bed-rest because of illness. Appellant asserted that he was legally separated from his first wife, that they were in the process of becoming divorced, that he planned to marry his fiancee as soon as the divorce was final, and that his probation officer was aware of all of this.

Appellant also explained that he took a trip out of the country under doctors advice. On return, appellant was questioned about the trip by his probation officer. The probation officer told him the trip would not be the basis for a violation since appellant travelled under his own name and returned to the jurisdiction.

Appellant's petition also asserts that he was being denied food which met the dietary prescriptions of his religion (Kosher food) and that he is not permitted to pray with other members of his faith. It also appears that appellant has alleged in his pro se petition that he was not

receiving adequate care for an ulcer and high pressure at the institution in which he was incarcerated.

Another petition, dated Aguust 5, 1975, and filed on August 21, 1975 (75 C. 1379), requested the Court to compel the Bureau of Prisons to release appellant on a furlough so that he might take care of several personal problems.

A third petition, dated August 19, 1975, and filed August 22, 1975 (75 C. 1395), alleged that appellant's attorney told him that he had arranged a sentence with the Assistant United States Attorney so that he would be sentenced to two years probation. Appellant said he did not appeal because his lawyer did not tell him of the right to appeal. Further, the attorney who represented appellant at the sentencing was someone he had not met before.

Without examination of the records of the prior proceedings, Judge Rayfiel wrote an opinion denying all relief. The Judge acknowledged that appellant alleged that his probation officer was aware of the change of address, and further, that appellant also alleged that the probation officer stated earlier appellant would not be subject to having parole revoked because of the trip. Nonetheless, Judge Rayfiel, without examining the tape of the parole hearing, denied relief:

> The findings of the Parole Board, upon which the revocation of parole was based, sustained the charges on the admissions of petitioner. Those findings have been affirmed on petitioner's appeal to the Regional Director of the Parole Board,

> and on further appeal to the National Appellate Board of the United States Board of Parole. At no time has the petitioner challenged those findings. While he argues that his parole officer was aware of the violations, he does not claim that the violations were with the parole officer's permission.
>
> It is well established that the Board of Parole has broad discretion in revoking parole.

With respect to appellant's claim that this attorney failed to advise him of the right to appeal, Judge Rayfiel said:

> . . . he was not prejudiced since he makes no claim of any jurisdictional defect in his conviction. He could not have raised any non-jurisdictional issues on appeal since his conviction was based on his plea of guilty.... A voluntary plea of guilty constitutes an effective and complete waiver of all non-jurisdictional defects which might be otherwise raised by way of defense, appeal or collateral attack.

As to the claim of sentence promise, the Judge stated:

> This vague, unsupported, conclusory claim of an unfulfilled agreement between petitioner's attorney and the Assistant United States Attorney, is clearly insufficient to warrant a hearing.

As to the claims with respect to prison conditions, Judge Rayfiel said they were moot, and further, that "control of prison administration is not a function of a sentencing court."

Appellant renewed his claims in another petition dated October 31, 1975. He reiterated that he was being denied

Kosher food and the opportunity to pray in accordance with his religion. By order of November 11, 1975, Judge Rayfiel denied the petition stating that his earlier opinion controlled.

ARGUMENT

THE JUDGE'S FAILURE TO REVIEW THE RECORD OF THE PRIOR PROCEEDINGS INVOLVING PETITIONER AND TO CONSIDER ON THE MERITS THE ISSUES RAISED IN THE PETITIONS REQUIRES THAT THE ORDER BE VACATED. THE JUDGMENT MUST BE VACATED BECAUSE THE PLEA WAS INVALID; ALTERNATIVELY, THE CASE MUST BE REMANDED.

The origins of these proceedings are three pro se petitions which present, albeit inartfully, several important issues. Further, the records of the pleading and sentencing in the underlying criminal case, which have never been seen by appellant or the District Judge, support the allegations included in the petitions, as well as providing the basis for vacature of the plea of guilty. Accordingly, the judgment of conviction should be vacated or the case remanded to the District Court for the filing of an amended petition and reconsideration of the issues.

A. Detention

From the chronology outlined, appellant's challenge to the conditions of his confinement are necessarily based on the conditions at the Queens House of Detention. Based on his allegations of improper medical treatment, appellant had a valid cause of action pursuant to 42 U.S.C. §1983 for injunctive relief or damages.* Indeed, claims of inadequate medical attention at the Queens House of Detention are now sub judice before Judge Dooling in Detainees of Queens House of Detention v. Malcolm, E.D.N.Y. 73 C. 1364.

* Judge Rayfiel concluded he had no power to consider the case as sentencing judge. However, his authority rested not under 28 U.S.C. §2255, but as a federal judge of the jurisdiction in which the Queens facility was located who can hear lawsuits under 42 U.S.C. §1983.

Appellant's claim for injunctive relief is now moot because of his return to Federal custody. However, on remand his pleading can be amended to request damages. Although his pleading does not now request damages, appellant cannot be charged with the responsibility for preparing pro se papers which meet the standards required of counsel.

B. The plea proceeding was invalid.

In his petition, appellant alleged that he was not told by his lawyer about his opportunity to take an appeal. Judge Rayfiel found taht such an omission was not prejudicial because, in the absence of a jurisdictional defect, there was no issue which could have been raised on appeal from the judgment of conviction based on a plea. In making his decision, Judge Rayfiel did not examine the minutes of either the plea or sentence proceedings.

Judge Rayfiel was incorrect in assuming that only jurisdictional defects are reviewable when a judgment is based on a guilty plea. Asserted violations of Rule 11 are properly raised on direct appeal. McCarthy v. United States, 394 U.S. 459 (1969).

If Judge Rayfiel had examined the minutes of plea, it would have become obvious that the plea proceeding was so defective as to violate due process and require reversal or vacature of the judgment. Thus appellant would have been successful on appeal.

Further, since appellant can make a claim of constitutional magnitude, going to the validity of his waiver of his Sixth Amendment right to trial by jury and his Fifth Amendment right to due process of law (see McCarthy v. United States, supra, 394 U.S. at 466), he is entitled to raise this claim in a §2255 application despite his failure to take a direct appeal. See, e.g., Davis v. United States, 417 U.S. 333, 345 (1974); Sunal v. Large, 332 U.S. 174, 178-179 (1947); Seiller v. United States, Doc. No. 75-2002, slip op. 6509 (2d Cir., December 1, 1975); United States v. Travers, 514 F.2d 1171 (1974); United States v. Fischer, 381 F.2d 509, 512 (2d Cir. 1967); cf. Kaufman v. United States, 394 U.S. 214 (1969); United States v. Robinson, 361 U.S. 220, 230 n.14 (1960).

Alternatively, appellant is entitled to challenge the validity of the District Court's acceptance of his guilty pleas by collateral attack because his failure to take a direct appeal did not constitute a waiver. A petitioner is precluded from raising issues by collateral proceeding which could have been raised on direct appeal only if he made a knowing and intentional waiver of his right to take a direct appeal. In Fay v. Noia, 372 U.S. 391, 439 (1963), the Supreme Court held that a state prisoner who had failed to take a

direct appeal from his judgment of conviction would be entitled to bring collateral proceedings in the Federal courts challenging that conviction unless he had waived his right to take a direct appeal. The Court further held that the classic definition of waiver enunciated in Johnson v. Zerbst, 304 U.S. 458, 464 (1938) --

> ... an intentional relinquishment or abandonment of a known right or privelege -- furnish the controlling standard.
>
> Fay v. Noia, supra, 372 U.S. at 439.

A Federal prisoner is clearly entitled to no lesser access to collateral proceedings, as the Federal courts have recognized in holding that

> Fay v. Noia and Johnson v. Zerbst furnish the controlling standard in waiver situations for Federal prisoners seeking post-conviction relief under §2255.
>
> Nash v. United States, 342 F.2d 366, 368 (5th Cir. 1965).

In the present proceeding, it is not even necessary for the District Court to conduct a hearing on the question of waiver: the record itself establishes that appellant did not make a knowing and intentional waiver of his right to take a direct appeal because he was never made aware of his right to appeal from his guilty plea. The transcripts of the plea and sentencing proceedings establish that the Court never informed appellant that he had such a right. Moreover, in appellant's §2255 application, he stated that he was never told of his right to appeal. Since the Government does not

dispute this claim, it must be taken as true. Rule 8(d), Fed. R.Civ.P. The failure by trial counsel to inform appellant concerning the right to appeal, in addition to being significant to the question of whether appellant knowingly and intentionally waived his right to appeal, has repeatedly been held to be an "exceptional circumstance" permitting a §2255 application despite the failure to appeal. See, e.g., Desmond v. United States, 333 F.2d 378 (1st Cir. 1964); Calland v. United States, 323 F.2d 405 (7th Cir. 1973); cf. United States ex rel. Williams v. LaVallee, 487 F.2d 1006 (2d Cir. 1973).

The minutes of the plea proceeding show that those proceedings violated due process and the requirements of Rule 11 of the Federal Rules of Criminal Procedure. The law is clear that a guilty plea is constitutionally defective if the defendant does not knowingly and intelligently waive the constitutional rights which traditionally accompany a trial:

> A defendant who enters [a guilty] plea simultaneously waives several constitutional rights, including his privilege against compulsory self-incrimination, his right to trial by jury, and his right to confront his accusers. For this waiver to be valid under the due process clause, it must be "an intentional relinquishment or abandonment of a known right or privilege."
>
> McCarthy v. United States, supra, 395 U.S. at 466.

The Court will not presume a waiver of these three important Federal rights from a silent record. Boykin v. Alabama, 395

U.S. 238, 243 (1969).

Here, Judge Rayfiel never even alluded to the right to remain silent or the right to confrontation. He told appellant only that if he went to trial, he was entitled to a jury and to have witnesses appear and testify on his own behalf. The manner in which Judge Rayfiel explained the rights not only produced a fatal omission, but quite possibly misled appellant. Appellant was told that he had the right to present witnesses. However, he was not advised that he need not present any evidence on his own behalf, or that the burden of proving guilt beyond a reasonable doubt rested with the Government. In re Winship, 397 U.S. 358 (1971). Thus, appellant could well have believed that it was his burden to prove himself innocent of the crime charged.

Further, since the Judge did not mention the right to remain silent, the impression was given that the confession appellant had earlier given to the FBI prevented a claim of privilege at trial. In any event, the failure to advise the defendant fully of his rights invalidates the plea:

> If a defendant's guilty plea is not equally voluntary and knowing it has been obtained in violation of due process and is therefore void.
>
> McCarthy v. United States, supra, 394 U.S. at 425.

Not only did the Judge fail to advise appellant of the rights he was relinquishing, he failed to determine whether there was a factual basis for the guilty plea.

The obligation of the District Court to establish "on the record"* that there is a factual basis for the guilty plea is evident not only from the face of Rule 11, but also from court decisions interpreting that rule. Thus, the Supreme Court, in McCarthy v. United States, supra, held:

> ... [I]n addition to directing the judge to inquire into the defendant's understanding of the nature of the charge and the consequences of the plea, Rule 11 also requires the judge to satisfy himself that there is a factual basis for the plea. The judge must determine "that the conduct which the defendant admits constitutes the offense charged in the indictment or information or an offense included therein to which the defendant has pleaded guilty." Requiring this examination of the relation between the law and the acts the defendant admits having committed is designed to "protect a defendant who is in the position of pleading voluntarily with an understanding of the nature of the charge but without realizing that his conduct does not actually fall within the charge."
>
> Id., 394 U.S. at 467. (Footnotes omitted).

See also Santobello v. New York, 404 U.S. 247, 261 (1971); Seiller v. United States, supra, slip op. at 6528 (majority opinion of Mulligan, J.), Irizarry v. United States, 508 F.2d 960 (2d Cir. 1975); United States ex rel. Dunn v. Casscles,

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*Santobello v. New York, 404 U.S. 247, 261 (1971); Irizarry v. United States, 505 F.2d 960, 966-968 (2d Cir. 1975). Under this Court's holding in Irizarry, if the district court has failed to put the information establishing the factual basis for the plea "on the record" at the time of the plea proceeding, the plea is invalid even if the court possessed at that time or afterward obtained other information which would establish a factual basis. Ibid.

494 F.2d 397 (2d Cir. 1974); Schworak v. United States, 419 F.2d 1313 (2d Cir. 1970); United States v. Steele, 413 F.2d 967, 969 (2d Cir. 1969).

At the plea proceeding in this case the Government introduced no evidence to establish a factual basis for appellant's plea of guilty. As the Judge was preparing to conclude the proceedings, the Assistant U.S. Attorney reminded him of the necessity of eliciting statements from appellant to establish such a basis. The Judge's response indicated that he was not aware of the mandatory nature of the responsibility under Rule 11 to make such an inquiry:

> I thought I read the charge. Did you commit the act?

In the ensuing colloquy, appellant and his lawyer told the Court that appellant had confessed, but there was no indication of the contents of the confession, and Judge Rayfiel never saw it.

Rule 11 also requires that a district judge shall not accept a guilty plea without first "determining that the plea is made voluntarily with an understanding of the nature of the charge...." The only inquiry made by Judge Rayfiel the requirements of Rule 11 here was to read the count of the indictment to appellant. Judge Rayfiel never asked appellant if he understood the charge, he never explained the specific meaning of "intent to steal," nor did he ask if appellant understood what that meant. Indeed, appellant made no comment at all about the charge or his

conduct throughout the entire proceeding, and the court did not address him concerning those topics.

While reading the count in the indictment may be a sufficient explanation of the charge if the crime is a simple one, here the specific intent required to constitute the crime necessitated a further explanation from the Judge. Irizarry v. United States, supra, 508 F.2d at 965. Further, even in the simplest cases, a response from the defendant reflected on the record indicating his comprehension and understanding is mandatory. There is no sign of such comprehension in this record.

> It would appear to be a minimal requirement of Rule 11 that the defendant's understanding of the nature of the charge be demonstrated on the record. Here, that requirement was not met.
>
> Irizarry v. United States, supra, 508 F.2d at 966.

Not only was their non-compliance with the requirements of due process and Rule 11, but appellant asserted in his petition that his plea was involuntary because a sentence agreement between defense counsel and the Assistant U.S. Attorney was not fulfilled. If the promise that a two year term of probation would be imposed was made by the Assistant U.S. Attorney, but was unfulfilled, and was the reason appellant entered a plea of guilty, either the plea must be vacated or the promise carried out. Santobello v. New York, supra. Despite Judge Rayfiel's hasty treatment of the allegation of a promise, the transcript of the plea proceed-

ing raises a question as to whether such an understanding existed. In what was indeed a minimal and inadequate colloquy, Judge Rayfiel remarked that appellant looked inquiringly several times at his counsel when asked if the plea was voluntary. Counsel explained that appellant was nervous, and the Judge continued with his questions. Appellant's looks to his lawyer were at least ambiguous, for they might well have indicated that he was unsure how to answer the questions concerning voluntariness if indeed there had been a sentence agreement.

The matter remained unclarified at sentence,* for at those proceedings appellant was represented by a man he had not seen until that day, and was essentially compelled to represent himself. It was appellant who begged the Judge for probation after the five-year term of imprisonment was imposed. It is strange, indeed, that a defendant with such a lengthy term of imprisonment would urge upon the court a sentence of probation rather than a shorter term of imprisonment. The literal cry for leniency might well have been stimulated by an earlier promise. While these interpretations of the ambiguous record are obviously not the only way to read the transcript, they are justifiable and provide a basis for the allegation of a promise. The claims are not, as Judge Rayfiel said, "unsupported," and at a minimum a hearing is required.

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*Sentence minutes are "D" to appellant's separate appendix.

The transcripts of the plea and sentence show that there was no compliance with due process and Rule 11, and that the plea may have been involuntary. It should be vacated.

C. The Judge was required to examine the tape of the parole revocation hearing.

The basis for revocation of appellant's parole was that he failed to report a change of address and left the jurisdiction without permission. Appellant asserts that his parole officer was aware of the change of address and that, in fact, the officer was able to contact him at that location. He further explained that the illness of his fiancee was the cause of the temporary change of address. He also asserted that he discussed the trip out of the jurisdiction with his parole officer and that the officer told him it would not constitute a violation. The officer also failed to tell him that what he might say at the interview concerning the trip would be used at a subsequent revocation hearing.

If these allegations were uncontradicted at the parole revocation hearing, there would have been no factual basis for the revocation on grounds of failure to report an address change. As to the trip, the parole board should be estopped from premising revocation upon an incident which appellant was told would produce no adverse result.

The Court does have the power to review the parole board's exercise of discretion and the fairness of its procedures (Earnest v. Moseley, 426 F.2d 466, 468 (10th Cir. 1970); Parole Board Cases, 388 F.2d 567, 575 (D.C. Cir. 1967); United States ex rel. Frederick v. Kenton, 308 F.2d 258 (2d Cir. 1962)), but such review was not possible without an examination of the board's proceedings. E.g., Moore v. Reid, 246 F.2d 654 (D.C. Cir. 1956); Carson v. Taylor, S.D.N.Y. 75 Civ. 398 (Frankel, J., November 14, 1975).

CONCLUSION

For the foregoing reasons, the order below should be reversed and the District Court directed to enter an order vacating the judgment of conviction and the plea of guilty; alternatively, the case should be remanded to the District Court for further proceedings.

Respectfully submitted,

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January 16, 1976

CERTIFICATE OF SERVICE

Jan 16, 1976

I certify that a copy of this brief and appendix has been mailed to the United States Attorney for the Eastern District of New York.